IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 350

WILLIAM G. BARR, *Petitioner*

v.

LINDA A. MATTEO AND JOHN J. MADIGAN

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS

BYRON N. SCOTT
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Attorneys for Respondents

Date: March 6, 1959

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Petitioner's thesis, if adopted by the Court, would place all Government officials who have it within their power to issue press releases, outside the law of libel (see Petitioner's Brief p. 14). No person's reputation would be safe from malicious attack by such officials. Petitioner was not, as he contends in his Brief, p. 11, the "head of an independent executive

agency." He was only a subordinate officer without policy making power, in a subordinate Office in an Agency in the Office of the President whose director was not a member of the Cabinet (Brief p. 6 and R. 43).

Nothing is more precious to man or woman than his or her good name—"it is the immediate jewel of their souls." The right to it is protected by natural as well as case law. Anything to the contrary is a court created exception to the rule, saving only the constitutional immunity given to Members of Congress for words spoken in debate in the Chambers. Heretofore, newly created exceptions have been limited, restrained and grudgingly yielded by the courts. Our Government has functioned and our citizens have been an enlightened people for over 150 years without the immunity now petitioned for by the Government for Petitioner and all others occupying comparable positions. Adoption of this thesis would open the flood gates. As the United States Court of Appeals for the District of Columbia Circuit said in its first opinion in *Barr* v. *Matteo and Madigan,* 244 F. 2d 767, "in explaining his decision to the general public, the defendant went entirely outside his line of duty. If such an officer were to do such a thing in bad faith or with a bad motive, no sufficient public interest would require that he be protected."

Petitioner advances the contention that the Deputy Director of the defunct Office of Rent Stabilization, a then subordinte branch of the Economic Stabilization Agency in the Office of the President (R. 43) could not have performed his official duties in administering rent control "fearlessly" and in a manner calculated to protect the public interest in the management of his office unless he could say in print whatever he chose

to say—impelled by whatever motive, malicious or otherwise—about anybody who might have any official contact with his office. Petitioner asks like immunity for like officials. To state the proposition in terms of the actual case before the Court should be to demonstrate its absurdity and its enormity.

The Courts have created some exceptions to the general rule that a man has a right to have his reputation respected by all and protected by the courts. They are said to have been grounded upon considerations of public policy—a curtailment of the rights of the individual for the greater good of all.

The Courts have made an exception in the cases of official reports of subordinates to their superiors, where it is the duty of the subordinate to report, about matters over which both exercise jurisdiction—as in the *Howard* case here and in *DeArnaud* v. *Ainsworth,* 24 App. D.C. 167, appeal dismissed, 199 U.S. 616, and like cases cited by petitioner. But, with a single exception, these cases have always been a reporting up—not out. That is not the case here. Petitioner made no report up—to a superior. He reported out—by issuing a press release to the general public.

The Courts have made an exception in the cases of judicial proceedings and of reports to law enforcing agencies of alleged malfeasances as in *Cooper* v. *O'Connor,* 99 F. 2d 135, certiorari denied, 305 U.S. 643 and like cases cited by petitioner. But that is not the case here.

The Courts have made an exception in the cases of erroneous or mistaken decisions of officials which cause damage as in *Gregoire* v. *Biddle,* 177 F. 2d 579, certiorari denied, 339 U.S. 949 and like cases cited by

petitioner. None of these cases grew out of a malicious and false press release such as the one which libelled respondents here.

Only in *Glass* v. *Ickes,* 117 F. 2d 273, 280, certiorari denied, 311 U.S. 718, has a Court "accorded" to a Government office absolute immunity from liability for defamation by a press release. Mr. Ickes was the Secretary of the Interior to which office the immunity was accorded. He reported "out" on an official action that had been taken by him in disbarring the plaintiff from practice before the Department. His press release was not an explanation of why he proposed to suspend an employee at some future date, as is the case here. In holding that:

> "to communicate information respecting the appellant's incapacity to the indefinitely large group of persons with rights subject to the Act, publication of an announcement in the press was proper, if not essential.

the Court said:

> "It may be that there are circumstances under which an official would exceed his prerogative in issuing a particular communication to the press."

And Chief Judge Groner concurring reluctantly declared:

> "* * * its cloak of absolute immunity offers such far-reaching opportunity for oppression, that it manifestly ought not to be extended beyond the impulse that gave it being. * * * I have felt some doubt about the correctness of the majority opinion. * * * I am impelled to concur in the opinion, though in doing so I express with great deference the fear that in this and previous cases we may have extended the rule beyond the reasons out of

> which it grew and thus unwittingly created a privilege so extensive as to be almost unlimited and altogether subversive of the fundamental principle that no man in this country is so high that he is above the law." (281-282).

Petitioner cites *Spalding* v. *Vilas*, 161 U.S. 483, as precedent for his plea for absolute immunity. He claims that this Court said in *Spalding* that the "Postmaster General was immune from liability in defamation for public statements" (p. 12). But this Court did not say that. The Postmaster General's publication was not a "public statement." Certain postmasters had certain claims against the Post Office Department under the law. The plaintiff represented many of them. As each claim was allowed, the Postmaster General, by letter, sent each claimant a warrant for the amount of his allowed claim together with a form letter or "circular" informing the claimant as to the law in his matter and a copy of the law on assignment of claims against the Government. The "publication" was directed privately to interested claimants only—there was no "public statement", discussion nor press release about the plaintiff in the *Spalding* case.

In that case, this Court said:

> "The thought that underlies the entire argument for the plaintiff is that the circular issued from the Post Office Department by direction of the Postmaster General was beyond the scope of any authority possessed by that officer; and therefore the sending of the circular *to the persons who had presented claims* against the Government was not justified by law, and would not protect the Postmaster General from responsibility for the injury done to the plaintiff from that act." (Emphasis added)

This Court asked:

> "If, as we hold to be the case, the *circular* issued by the Postmaster General *to claimants* under the Act of Congress in question was not unauthorized by law or beyond the scope of his official duties, can this action be maintained because of the allegation that what that officer did was done maliciously?" (Emphasis added)

And this Court answered:

> "Whatever difficulty may arise in applying these principles to particular cases, in which the rights of the citizen may have been materially impaired by the inconsiderate or wrongful action of the *head of a department*, it is clear—*and the present case requires nothing more to be determined*—that he cannot be held liable to a civil suit for damages on account of *official communications* made by him *pursuant to an Act of Congress*, and in respect of matters within his authority, by reason of any personal motive that might be alleged to have prompted his action for personal motives cannot be *imputed* to duly authorized official conduct. * * * In the present case, as we have found, the defendant, in issuing the circular in question, did not exceed his authority, nor pass the line of his duty as Postmaster General." (Emphasis added.)

There is nothing in the opinion to indicate that the ruling would have been the same had the Postmaster General issued a press release defaming the plaintiff instead of writing official letters to individual claimants who had a personal interest in receiving the information. In the instant case, the lower Court has said that a letter from defendant to his official superiors explaining his decision would have been within his general line of duty but that "in explaining

his decision to the general public, the defendant went entirely outside his line of duty."

Mellon v. *Brewer*, 18 F. 2d 168, certiorari denied, 275 U.S. 530 is cited by petitioner with the *Ickes* case (p. 12) and as authority (p. 16) for the "public statements" immunity. But the court in *Mellon* "presumed" that the Secretary's letter to the President had been released to the press with the President's approval after it had been received by the President. The *Mellon* case, even though Mr. Mellon was the Secretary of the Treasury, was just another *DeArnaud* v. *Ainsworth* case.

Of course, the only way to make a government officer on any level absolutely immune to suit, other than by Congressional legislation, is for the Court to "accord" the office absolute immunity (See Petitioner's Brief p. 14). It must apply to the officer's position—not to the occasion (Petitioner's Brief p. 15), if the officer is to be immune. Such immunity is not necessary for efficient government. Petitioner would have performed his duty "freely", "vigorously" and "fearlessly" by suspending the respondents and reporting to his superior officer his reasons for having done so. His superior officer could then have decided whether or not the occasion called for a libelous press release and taken the consequences whatever they might have turned out to be. Absolute immunity such as petitioned for here would be an open invitation to irresponsibility on the part of officers such as petitioner.

Petitioner states (p. 19-20) that "Congress has given repeated emphasis to the public's 'right to know.'" He says that a denial of absolute immunity to petitioner "would seriously impair" the "public official's informing function." If Congress wants officers on

petitioner's level to perform their "informing function" without risk of suit for libel when they inform falsely, Congress should grant that immunity.

In summary, petitioner was neither "a high policy-making official of the Government" nor the "head of an important Government Agency." The occasion and what had happened could not justify the granting of absolute immunity. Denial of the immunity will help to keep reckless Government officers within the law and the law above men in this country—as it should be. For the reasons stated, it is respectfully submitted that the order granting the writ should be vacated and the Petition denied.

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Date: March 6, 1959